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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS, a Corporation,
Petitioner,

vs.

GERTRUDE MOONEY, Administratrix
of the Estate of Neil P. Mooney,
Deceased,
Respondent.

No. 1267.

125

BRIEF FOR RESPONDENT.

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Respondent.

No. 1367.

BRIEF FOR RESPONDENT.

STATEMENT.

In addition to the summary statement contained in petitioner's brief (p. 3 et seq.) respondent desires to call the Court's attention to the following facts:

It was the decedent's duty to place himself at the west end of track No. 4, where the switched car would come to rest, in order that he might set the brake or put a block under the wheel so that the car would not run back and foul the tracks (R. 24, 25, 27). This securing of the car must be done the moment the car stops and before it begins running back (R. 124).

It was the practice and custom of the petitioner in making switch movements of the character in question in the Seventh Street yards to withhold starting the movement until every member of the crew had reached his proper place for the execution of the movement (R. 96, 97). As above noted, Mr. Mooney's proper position was at track No. 4, and the movement was started before he reached that place. When he turned southwardly toward the track, after having walked eastwardly, he was opposite his proper position and was on his way there (R. 27). To reach his proper position it was necessary to cross over track No. 5 on which the engine was operating (R. 98, 99).

Petitioner's engineer testified that it was the custom for him to look out for employees as much as possible in making such a movement (R. 75), and that it was his duty to do so (R. 79). At the time the cab of his engine passed the switch at which the foreman was standing he was looking east to see if he had a clear track (R. 66).

One John S. Evens, a former Terminal switchman, testified that the practice and custom of the engineers in making a flying switch was to keep a lookout in the direction the locomotive was moving (R. 95). James T. Walker, a former locomotive engineer, also testified it was customary for the engineer to keep a lookout in the direction his engine was moving and it was unnecessary that he look in the other direction to watch the car that was being switched (R. 136, 137). Petitioner's engineer testified that there had been no change in the customs and practices observed in these switching movements for the past 28 years (R. 80).

Mooney walked eastwardly (R. 27), turned at a point about 10 feet north of the track on which the engine was being operated and walked toward the track without looking back toward the engine (R. 28). The switch foreman then realized that he was going upon the track and

realized Mooney's peril (R. 29, 36, 40). The advancing end of the tender was then about 100 feet from where Mooney was about to cross the tracks (R. 36, 37). It could have been stopped with safety in 25 feet at the speed it was operating (R. 134). In fact, it was stopped in 25 feet after the engineer finally received the emergency signal from the switch foreman (R. 75).

When the switch foreman observed Mr. Mooney's peril he abandoned all thought of throwing the switch and gave his entire attention to calling to Mooney and the engineer and giving emergency stop signals (R. 29, 30). The signals were not seen or heeded by the engineer until after Mooney had been struck. Mr. Mooney approached the track from the engineer's side and was at all times within the engineer's view (R. 28).

SUMMARY OF ARGUMENT.

I.

The decision in this case in no way impairs the uniformity of construction of the Federal Act which makes the carrier liable for any injury to an employee resulting in whole or in part from the negligence of any other of the carrier's agents, servants or employees.

Federal Employers' Liability Act, 45 U. S. C. A.,
Sec. 51.

A recovery under the Act by a negligent employee is not limited to the last chance doctrine since the Act itself provides that contributory negligence shall not bar a recovery.

Federal Employers' Liability Act, 45 U. S. C. A.,
Sec. 53.

II.

The evidence presented an issue of fact as to whether petitioner's engineer was guilty of negligence proximately contributing to the fatal injury to decedent.

The engineer was under a legal duty to keep a lookout for decedent and by so doing would have discovered him in a perilous position in ample time for the engineer to have stopped the engine or sounded the whistle and thus have saved Mooney. In failing to avert the accident the engineer failed to do what a reasonably prudent person would have done under the circumstances.

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54,
65, 67, 63 S. Ct. 444, 451, 87 L. Ed. 610;
Norfolk & Western R. Co. v. Earnest, 229 U. S.
114, 118, 33 S. Ct. 654, 57 L. Ed. 1096.

III.

Decedent's conduct may not be regarded as the sole cause of his fatal injury.

(1) If Mooney was negligent and his negligence continued to the instant of the injury, this would not relieve petitioner of liability for the engineer's negligence. The Act itself makes no exception where contributory negligence is concurrent in point of time with that of the carrier.

Union Pacific R. Co. v. Hadley, Admr., 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751.

(2) Neither the fact that the engine bell was ringing throughout the movement nor the fact that Mooney had been thrice instructed by the foreman as to the movement to be made relieved the engineer from the performance of the legal duty owing to Mooney. Decedent had the right to rely upon the observance of the customary practice of withholding the movement until he had crossed over the tracks and reached his place at track No. 4 for the performance of his duty of blocking the car.

Owens v. Union Pacific R. Co., 319 U. S. 715, 63 S. Ct. 1271, 1273, 87 L. Ed. 1683;

Dir. Gen. v. Templin, 268 Fed. 483;

St. Louis-San Francisco Ry. Co. v. Jeffries, 276 Fed. 73, 75;

Wyatt v. N. Y. O. & W. R. Co., 45 F. (2d) 705, 707.

(3) Mooney's failure to discover the engine was at most contributory negligence.

Owens v. Union Pacific R. Co., *supra*;

Rocco v. Lehigh Valley R. Co., 288 U. S. 275, 279, 53 S. Ct. 343, 77 L. Ed. 743.

IV.

Respondent was not bound by the testimony of the engineer that he did not see decedent nor by the testimony of the foreman that he instructed decedent as to the movement because:

(1) A party is not concluded by the testimony of his witness where there is other testimony from which a contrary inference may legitimately be drawn.

32 C. J. S., p. 1104, Sec. 1040;
Gibson v. Sou. Pac. Co., 67 F. (2d) 758.

(2) The jury could well have found that the instructions to Mooney were not equivalent to informing him that the usual custom of withholding the movement until he reached his position would be violated.

Emanuel v. Kansas City Title & Trust Co., 127 F. (2d) 175, 1. c. 180.

(3) The testimony of the engineer that he failed to see what was plainly within his view while he was under a duty to keep a lookout and failed to see what the switch foreman, in the same position, saw and appreciated is wholly unbelievable.

Bash v. B. & O. R. Co., 102 F. (2d) 48.

V.

The complaint as to the argument of respondent's counsel may not be considered by this Court because:

(1) The point involves no construction of the Federal Act and the decision rests upon an independent ground of state jurisdiction sufficient to support the judgment.

Central Vermont R. Co. v. White, 238 U. S. 507,
509, 35 S. Ct. 865, 59 L. Ed. 1433.

(2) Whether a verdict is brought about by improper argument is a matter resting within the discretion of the Trial Court. The Trial Court in this case held there was no prejudicial effect and the Supreme Court found there was no abuse of discretion.

Fairmount Glass Works v. Coal Co., 287 U. S. 474,
485, 53 S. Ct. 255, 77 L. Ed. 445.

(3) The statement of respondent's counsel in the argument that Mooney would earn so much during his life expectancy (R. 191) furnishes no ground of complaint because:

(a) The instructions (R. 153) limited the award to the present cash value of the pecuniary loss.

(b) The jury did not award the total earnings.

ARGUMENT.

I.

The Decision in This Case Does Not Impair the Uniformity of Construction of the Federal Act.

Petitioner urges that the Court below based its decision upon the humanitarian doctrine—a doctrine peculiar to the State of Missouri. Counsel argues that this Court recognizes only the last chance doctrine, which is concededly more limited than the humanitarian rule. We shall point out hereafter in this brief that the conduct of petitioner's engineer amountd to negligence, as defined and applied by this Court and other Federal Courts. The fact that the evidence in the present record fits the pattern of the Missouri humanitarian doctrine is merely a coincidence.

There is no necessity of considering the refinements of the last chance doctrine. It was not invoked in the present case, respondent did not limit her case to that kind of negligence, and the Employers' Liability Act does not so limit her rights. The last chance and humanitarian doctrines are resorted to to permit recovery by negligent plaintiffs in those cases in which contributory negligence would otherwise defeat the actions. But the Act itself, 45 U. S. C. A., Section 53, eliminates contributory negligence as a defense in bar and substitutes the rule of comparative negligence, making the negligence of the injured person available to the carrier only in diminution of damages.

The Federal Act, 45 U. S. C. A., Section 51, makes the carrier liable for any injury to an employee which results "in whole or in part" from the negligence of any other of its agents or employees. The sole question for consideration in the instant case is whether the evidence presented an issue of fact as to whether petitioner's engineer was

guilty of negligence proximately contributing to the death of Mooney. It is of no consequence that the negligence submitted embraces counterparts of the Missouri humanitarian doctrine. The rule of uniformity is in no way impaired by that fact if the evidence also makes a case of negligence as defined and applied by this Court. This, as we construe it, was the view of the Court below. The Court found the evidence did make a case under the decisions of this Court and, in so holding, we submit the Court was undoubtedly correct.

II.

The Evidence Made a Case of Negligence on the Part of Petitioner's Engineer.

The vital question to be determined is: Was the evidence sufficient to permit the jury to find with propriety that petitioner's engineer was guilty of negligence proximately contributing to decedent's fatal injuries? An affirmative answer to this question establishes liability.

The factual situation may be briefly summarized. There was a long standing, uniform custom requiring petitioner's engineers, in making flying switch movements, to keep a lookout in the direction the engine is moving so as to discover any persons, including employees, either on or within dangerous proximity to the track (R. 94, 95). Mooney walked eastwardly with his back to the locomotive, in plain view of the engineer, and then turned southwardly on his way to track No. 4 where his duties required him to be at the moment the switched car came to rest on that track. After turning southwardly, decedent, without looking toward the engine, walked steadily to and upon the track. At that time the switch foreman saw and realized that Mooney was going upon the track and that he would be struck unless the engine were stopped. So apparent and impending was the peril that the fore-

man disregarded all thought of lining the switch to shunt the car onto track No. 4 and gave his entire attention to calling and giving emergency stop signals, which were unseen or unheeded by the engineer (R. 29, 30). At the time Mooney's peril became apparent the advancing end of the locomotive tender was approximately 100 feet from the point where Mooney was approaching the track and could have been stopped in 25 or 30 feet (R. 134). The brakes were not applied until after Mooney had been struck, and no whistle was sounded at any time. As the engineer, sitting in his cab, was passing the switch (162 feet from where Mooney was injured) (R. 32), the engineer was looking east and had an unobstructed view. There was evidence of a well defined custom of the engineers to sound a whistle if any employees were seen on or about to go upon the tracks (R. 80).

The Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, provides that every common carrier by railroad engaged in interstate commerce shall be liable in damages to any person suffering injury while employed by it in, or in furtherance of or substantially affecting such commerce (or to his personal representative if the injury proves fatal), for such injury or death resulting in whole or in part from the negligence of the carrier, its officers, agents, or employees. The Act does not define negligence, but this Court has defined it as:

“the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done.”

Tiller v. Atlantic Coast Line R. Co., 63 S. Ct. 444,
451, 318 U. S. 54, 65-67, 87 L. Ed. 618.

In view of the long standing custom to look out for switchmen a duty was enjoined upon the engineer to keep

such lookout. He could not close his eyes and be heard to say that he did not see the decedent, but must be held to have seen what, by looking, he could have seen. There was a long standing custom to withhold the flying switch movement until the fieldman (Mooney) had reached his place of duty. To reach this place he necessarily must cross the track upon which the engine would be operated, so the engineer had no right to expect a clear track.

Not only was the engineer duty bound to keep a lookout by reason of the custom but the very situation here demanded that he do so. He knew that Mooney or some member of the crew would be obliged to cross the track so as to be in a position to block the car on track No. 4 (R. 87). The evidence shows no necessity for the engineer looking in any other direction except to the east as his engine proceeded to and upon the cross-over track. He must have anticipated that the fieldman (Mooney) would at some moment before the engine reached there cross over to track No. 4.

In *Norfolk & Western R. Co. v. Earnest*, 229 U. S. 114, l. c. 118, this Court said:

“As before indicated, there was evidence tending to show that it was usual for the pilot to walk between the rails in advance of the locomotive, that the conditions outside the track made it necessary to do so in the nighttime, and that all this was known to the engineer. Whether the evidence was true was for the jury to determine, and if it was true it certainly could not be said as matter of law that the engineer was in the exercise of ordinary care, which was the controlling standard for him, if he made no effort to see whether the plaintiff was on the track and took no precautions for his protection.”

In the case at bar the accident happened in broad daylight. Decedent approached the track from the engineer's

side. The engineer's view was unobstructed. The foreman saw and realized Mooney's peril when the advancing end of the locomotive tender was yet 100 feet away from Mooney. The engine could have been stopped in 25 or 30 feet. The foreman gave emergency stop signals and shouted, but his signals were unseen or unheeded by the engineer and the brakes were not applied until after Mooney had been struck. We think it clear from these facts that petitioner's engineer failed to exercise ordinary care and that his failure proximately contributed to Mooney's death.

III.

Decedent's Conduct Was Not the Sole Cause.

Learned counsel for petitioner lays stress upon the claim that Mooney's negligence continued to the instant of the injury. Incidentally, petitioner pleaded no contributory negligence and this issue was not in the case for any purpose. Petitioner argues, however, that Mooney was negligent and that, having continued to the instant of the injury, petitioner is somehow relieved of liability and Mooney's conduct must be considered the sole cause of his death. But the Act itself, 45 U. S. C. A., Section 53, provides that contributory negligence shall not bar a recovery. There is no suggestion in this Act that negligence concurrent in point of time could do any more than diminish the damages. Certainly this Court has never read any such exception into the Act and a recovery has never been denied where there was actionable, causal negligence on the part of any other of the carrier's employees.

In *Union Pacific R. Co. v. Hadley*, Admr., 246 U. S. 330, a brakeman named Cradit lost his life while in the caboose of his train, which had been stopped upon a single track. Another train approaching from the rear crashed into the caboose, inflicting fatal injuries to Cradit. It was his

duty to leave the caboose, walk back along the track and flag approaching trains. Concededly he failed in this duty, and the railroad company urged that his negligence in so failing was the sole efficient cause of his death. It appeared, however, that the crew of the following train was negligent in running against the signals and the dispatcher was remiss in permitting the second train to proceed to the point of collision. This Court said:

“But it is said that, in any view of the defendant’s conduct, the only proximate cause of Cradit’s death was his own neglect of duty. But if the railroad company was negligent, it was negligent at the very moment of its final act. It ran one train into another when, if it had done its duty, neither train would have been at that place. Its conduct was as near to the result as that of Cradit’s. We do not mean that the negligence of Cradit was not contributory. We must look at the situation as a practical unit rather than inquire into a purely logical priority. But, even if Cradit’s negligence should be deemed the logical last, it would be emptying the statute of its meaning to say that his death did not ‘result in part from the negligence of any of the employees’ of the road.”

Conceding (without admitting) that Mooney was negligent and that his negligence continued to the very moment of his injury, it must be observed also that the negligence of petitioner’s engineer continued to operate as an efficient cause of Mooney’s death until the very same moment.

Neither the fact that the engine bell was ringing throughout the movement nor the fact that Mooney had been thrice instructed by the foreman of the movement that was to be made can relieve the petitioner of liability for the violation by its engineer of the legal duty owing to Mooney. Decedent had the right to rely and presumably did rely on the custom to withhold the movement until he had reached the place on track No. 4 for the per-

formance of his duty. *St. L. S. F. Ry. Co. v. Jeffries*, 276 F., l. c. 75. When the foreman instructed Mooney as to the movement he also instructed him to procure a block and secure the car when it reached its place on track No. 4. The instruction as to the intended movement was not equivalent to warning him that the usual practice of withholding the movement would be violated. While the evidence shows that the bell was ringing throughout the movement (R. 48, 84), it does not appear the bell was started as the engine was about to move. So it cannot be said that it was a sufficient warning to Mooney of the close and dangerous proximity of the engine even had he heard the bell, and it is a fair inference that he did not hear it. But, if we give to the three warnings the import claimed by petitioner, Mooney's disregard of the warnings or his failure to hear or heed the bell was at most only contributory negligence.

In *Owens v. Union Pacific R. Co.*, 319 U. S. 715, 63 S. Ct. 1271, 1273, Owens was fatally injured when run over by cars that were being "kicked" by his crew, of which he was the foreman. Owens himself gave the order to Koefod, a member of the crew, to "let these cars go 13." There was evidence it was customary to delay the switching movement until an employee in Koefod's position would see that the man at the switch (Owens) was out of harm's way and to wait until Owens had signaled for the movement. After having set the switch Owens began to walk across the track to the north side. No evidence was available or introduced to show his reason for doing so. Since he was looking northwardly he did not see the kicked cars until too late. This Court said, 63 S. Ct. 1273:

"If this were all the evidence, the case would be clearly one in which the jury might find there was negligence on the part of Koefod or the engineer, or both, and that Owens' conduct amounted to no more than contributory negligence, if it was that."

Such cases as *Unadilla Valley R. Co. v. Caldine*, 278 U. S. 139, cited by petitioner (p. 26 of petitioner's brief) do not support the argument that any negligence of the injured employee, however gross, may necessarily be the sole cause of his injury. In those cases there was no negligence attributable to any other employee of the carrier. The distinction was stated by this Court in *Rocco v. Lehigh Valley R. Co.*, 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743. After referring to the *Caldine* and other similar decisions, this Court said, 288 U. S., l. c. 279:

"In none was there any negligence on the part of employees operating the train moving in the opposite direction."

IV.

Respondent Is Not Concluded by the Testimony.

Petitioner says respondent is bound by the testimony of its employees whom she was forced to call as witnesses in her behalf. We understand the rule to be that a litigant is bound by the testimony of his witnesses upon a given issue if there is no other testimony from which a contrary inference may reasonably be drawn. Two matters are stressed by petitioner. The first—the testimony of the foreman that he thrice instructed Mooney about the contemplated movement—has been discussed heretofore in this argument. Not only was Mooney instructed as to the movement, but he was also instructed by the foreman to obtain a block and secure the car when it reached its place on track No. 4. It was customary to withhold the movement until Mooney had reached that place. Therefore, reasonable minds could well conclude that the instructions were not intended to and could not be interpreted as notice to Mooney that the usual custom would be violated. He was, therefore, entitled to the protection of a lookout being kept by the engineer, and was entitled to a warning of the dangerous approach of the engine.

The second matter—the testimony of the engineer that he did not see Mooney—avails the petitioner nothing. The actual discovery of peril is not a condition precedent to liability. Moreover, the undisputed facts that the engineer was looking to the east and had an unobstructed view render his testimony that he did not see Mooney wholly unbelievable. He was bound to see and appreciate what the foreman, in substantially the same position, saw and appreciated.

V.

Argument of Counsel.

This Court is without jurisdiction to consider the complaint of alleged prejudicial argument to the jury. The point involves no construction of the Federal Act. Whether the argument was prejudicial was within the discretion of the Trial Judge. The Supreme Court of Missouri held there was no abuse of discretion. Its decision in this respect rests upon an independent ground of state jurisdiction sufficient to support the judgment, and in this situation certiorari will not be granted.

In *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433, this Court said, 238 U. S., l. c. 509:

“Some of the assignments in the present case relate to matters of pleading; others to the admissibility of evidence, to the sufficiency of exceptions and to various rulings of the trial court which involve no construction of the Employers’ Liability Act and which, therefore, cannot be considered on writ of error from a state court.”

In leaving such matters to the discretion of the Trial Court the practice of the Federal Courts is the same as that of the Missouri Courts.

In *Fairmount Glass Works v. Coal Co.*, 287 U. S. 474, 77 L. Ed. 445, 53 S. Ct. 255, this Court said, 287 U. S., l. c. 485:

“Appellate Courts should be slow to impute to juries a disregard of their duties and to Trial Courts a want of diligence or perspicacity in appraising the jury’s conduct. * * *

“It is urged that the refusal to set aside the verdict was an abuse of the Trial Court’s discretion and hence reviewable. The Court of Appeals has not declared that the Trial Judge abused his discretion.”

So in the instant case the Trial Judge in overruling petitioner’s motion for a new trial necessarily found that the verdict was not the result of prejudicial argument, and the Supreme Court held that the Trial Court did not abuse its discretion. The case, therefore, is not like *Minneapolis etc. Ry. Co. v. Moquin*, 283 U. S. 520, relied on by petitioner. In that case the Supreme Court of Minnesota specifically found:

“From the entire record before us we are of the opinion that the verdict is excessive because of passion and prejudice” (283 U. S., l. c. 521).

A new trial was ordered unless a remittitur of a portion of the judgment was made. It may be conceded that, in a case under the Federal Act, a verdict found to be the result of passion and prejudice cannot be cured by remittitur. That is not the situation pertaining in the case at bar. Here the Trial Judge ordered a remittitur because he thought the jury had erred in calculating the present cash value of the pecuniary loss to the widow and minor children.

There is no merit to petitioner’s point that respondent’s counsel induced the jury to award respondent the total earnings of decedent. The instruction of the Court

on the measure of damages (R. 153) limited the award to the present cash value of the pecuniary loss. The total earnings of decedent of \$2400.00 per year for his life expectancy of thirty-five years would be \$84,000.00, so it conclusively appears that the jury were not influenced by counsel's argument.

CONCLUSION.

It is respectfully submitted that the decision of the Court below is in complete harmony with the decisions of this Court and the lower Federal Courts; that the evidence met the test of negligence and proximate cause as laid down by this Court in decisions construing the Act, and that, therefore, the writ prayed for herein should be denied.

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